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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SOCORRO DE LA CRUZ, Plaintiff and Appellant, v. EL POLLO LOCO, INC. et al., Defendants and Respondents.	B255434 (Los Angeles County Super. Ct. No.BC494657)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Ann Murphy and Frederick C. Shaller, Judges. Affirmed in part and remanded in part.

Gary Rand & Suzanne E. Rand-Lewis, Suzanne E. Rand-Lewis, Gary Rand and Timothy Rand-Lewis for Plaintiff and Appellant.

Ogletree, Deakins, Nash Smoak & Stewart, Keith A. Watts, Rafael G. Nendel-Flores and Serafin H. Tagarao for Defendants and Respondents.

INTRODUCTION

Plaintiff Socorro De La Cruz worked at El Pollo Loco for fifteen years until a series of shoulder injuries limited her ability to perform essential job functions. She resigned from El Pollo Loco in exchange for $20,000 pursuant to a settlement negotiated by counsel. Represented by new counsel, plaintiff later sued El Pollo Loco and two human resources employees (collectively, defendants) for several employment-related claims, including wrongful termination and discrimination under the Fair Employment and Housing Act (FEHA).

Defendants moved for summary judgment and plaintiff did not oppose. A day before the scheduled hearing on the motion, however, plaintiff filed an ex parte application for a continuance. Relying on Code of Civil Procedure section 473, subdivision (b),[1] plaintiff's counsel stated that she had been sick and consequently unable to oppose the motion. The trial court denied plaintiff's request, finding no good cause for a continuance because counsel's explanations for her failure to file an opposition were unsupported by the submitted evidence and contradicted by her own actions. On appeal, plaintiff argues that the trial court abused its discretion by refusing to continue the hearing.

At the hearing on the motion for summary judgment the following day, plaintiff's counsel orally objected to some of the evidence defendants presented in support of their motion. The trial court held that defendants met their burden on summary judgment, overruled plaintiff's objections, and granted the motion. On appeal, plaintiff challenges the admissibility of defendants' evidence and the procedural propriety of defendants' separate statement.

Following entry of judgment, defendants sought attorney fees under FEHA and costs as prevailing party. The trial court awarded both, and plaintiff challenges both awards. We find that the trial court did not abuse its discretion in awarding a very modest amount of attorney fees. Because the Supreme Court recently articulated revised

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

standards for awarding costs in FEHA cases in *Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97 (*Williams*), we remand that portion of the judgment to the trial court for reconsideration of the cost award in light of that decision. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Plaintiff's work history with El Pollo Loco*

Plaintiff was employed as a manager at an El Pollo Loco restaurant for fifteen years, beginning in 1995 at the age of 44. Plaintiff suffered medical problems with her right hand, arm, and shoulder throughout her tenure at El Pollo Loco; she had two surgeries for a torn rotator cuff and participated in physical therapy to address ongoing problems. Plaintiff took medical leaves of absence in early 2001, from November 2001 to January 2002, from February 2002 to November 2002, from November 2008 to June 2009, in March 2010, and from April 2010 to October 2010. At various times between medical leaves, plaintiff requested and received accommodations such as light duty, reduced hours, and limitations on lifting heavy objects with her right arm.

Following plaintiff's shoulder surgery in 2010, her physician recommended permanent restrictions, including limited lifting, pushing, and pulling with her right arm and limited overhead work. The physician's permanent and stationary report stated that plaintiff's right shoulder had "significant underlying changes" from previous surgeries, and he apportioned the injury as 80 percent caused by exacerbation of previous injuries and 20 percent caused by aggravating activities at work.

After plaintiff's physician cleared her to return to limited work duties in October 2010, El Pollo Loco considered whether it could accommodate plaintiff's permanent restrictions without risking re-injury to her shoulder. Plaintiff's position as general manager, and all positions within the restaurants, entailed lifting heavy containers of food and drinks, reaching overhead, and making other movements that plaintiff's physician had restricted. According to El Pollo Loco, because plaintiff's injury was an exacerbation of her preexisting shoulder problems and all positions at El Pollo Loco require lifting, pushing, pulling, and reaching in excess of plaintiff's medical restrictions,

it was unclear whether plaintiff would ever be able to return to work without re-injuring her shoulder.

When El Pollo Loco did not immediately return plaintiff to work, plaintiff, represented by counsel, filed an application of claim with the Workers' Compensation Appeals Board (WCAB). Shortly thereafter, El Pollo Loco determined it would not be able to accommodate plaintiff's permanent work limitations, and sought a settlement. Still represented by counsel, plaintiff negotiated a settlement of her claims with El Pollo Loco. In exchange for a settlement of $20,000, plaintiff signed a letter of resignation effective January 18, 2011. The letter states, "I am signing this letter voluntarily, without any coercion, duress, undue influence and/or fraud. I am signing this resignation independent of my workers' compensation claim."

B. *Plaintiff's lawsuit*

In October 2012, plaintiff sued El Pollo Loco, Inc. and two employees of El Pollo Loco's human resources department, Shirene Alexis and America Verdugo. Plaintiff asserted employment-related causes of action including breach of contract, wrongful termination, intentional infliction of emotional distress, violation of FEHA, and fraud.[2] According to her complaint, she sought damages "for discrimination based primarily upon age, physical disability from work-related injuries, perceived disability, and retaliation for filing for Workers' Compensation benefits, as well as refusal to evaluate and accommodate plaintiff's disability."

The litigation was contentious. The trial court noted on the record that although it is not uncommon to see acrimony between counsel, the disagreements in this case were "way out there at the end of the bell curve." Defense counsel sought appointment of a referee to address the parties' disagreements about discovery; the court denied the request. At one point the court ordered that depositions be conducted in the jury deliberation room, but after the attorneys' raised voices continued to disrupt court

[2] Plaintiff also alleged violations of Business and Professions Code section 17200, et seq.; the Consumer Legal Remedies Act, Civil Code section 1770; and the California Constitution.

proceedings, the court determined that counsel could no longer use the jury room for depositions.

Defendants first noticed plaintiff's deposition in December 2012, but plaintiff refused to appear. In April 2013 the court ordered plaintiff to appear for her deposition in May, but she did not. The court later noted that plaintiff's failure to appear violated a court order and warned that any further delays would result in sanctions. Plaintiff's deposition was finally completed over several days in late August 2013.

In her deposition and through other discovery, plaintiff admitted she was an at-will employee with no employment contract. She agreed that El Pollo Loco honored each of her requests for leave and for accommodations relating to her medical limitations, except for the permanent limitations following her second surgery, after which she did not return to work. Plaintiff acknowledged that all positions at El Pollo Loco restaurants required workers to lift heavy items and reach above their heads; she therefore never requested a different position with El Pollo Loco.

Plaintiff heard two age-related comments while working at El Pollo Loco. In one conversation sometime between 2005 and 2008, a manager told plaintiff that defendant Shirene Alexis said that all older general managers would be fired because they made more money than younger general managers. Plaintiff admitted she was unaware of any older managers actually being fired. Plaintiff also testified at deposition that one of the managers called her "old lady," but she admitted she never experienced any negative employment actions based on her age.

C. *Defendants' motion for summary judgment and plaintiff's ex parte request for a continuance*

Defendants filed a motion for summary judgment. They argued that because plaintiff signed a voluntary letter of resignation while represented by counsel and in exchange for a settlement, none of her claims of wrongful termination or discrimination was viable. Because plaintiff admitted that El Pollo Loco accommodated plaintiff's leaves of absence and temporary physical limitations, defendants contended that plaintiff's claims of disability discrimination had no merit. Defendants also pointed out

that there was no breach of contract or fraud, as plaintiff was aware she was an at-will employee. In addition, there was no basis to plaintiff's age discrimination claims because she remembered only two stray remarks and experienced no age-related adverse employment actions.

The parties agreed to shorten the notice period for the motion for summary judgment to accommodate the need to reschedule plaintiff's deposition. The motion was filed on September 9, 2013 with an initial hearing date of October 31, 2013. Based on that hearing date, plaintiff's opposition was due October 17. Two weeks before her opposition was due, on October 3, 2013, plaintiff moved for a continuance of the hearing on the motion for summary judgment, as well as a continuance of trial and all related dates. Relying partially on section 437c, subdivision (h), plaintiff argued that certain discovery was needed before she could file an opposition. The trial court vacated the trial date and moved the summary judgment hearing to February 5, 2014. The court noted that the opposition and reply dates relating to the motion for summary judgment were to comply with the Code of Civil Procedure. Based on the new hearing date, plaintiff's opposition to the motion for summary judgment was due on January 22, 2014. (§ 437c, subd. (b)(2).)

Events in January 2014 are important to plaintiff's arguments on appeal, so they are recounted in detail here. On January 3, 2014, counsel for plaintiff, Suzanne Rand-Lewis, notified defendants' counsel by email that a mandatory Civil Referee-Assisted Settlement Hearing (CRASH) had been set for January 27. On January 10, Ms. Rand-Lewis signed and served extensive objections to a deposition notice and request for documents directed to plaintiff's workers' compensation attorney, Ernest Buongiorno. On January 13, Ms. Rand-Lewis sent another email to El Pollo Loco's counsel, which states in full: "I would very much appreciate hearing from you to confirm receipt [of notice of the CRASH date]. I would also like you to stipulate to continue the MSJ and opp. date a few weeks to follow the crash settlement conference. If I do not hear from you I wil [sic] proceed ex parte and request the Court permit us to attend the conference

without having to do the extra work and incur the fees associated with completing the Oppositions. Thank you. Suzanne E. Rand-Lewis."

Counsel did not seek a continuance, and plaintiff did not file an opposition by the January 22 deadline. On January 27, a few hours before the CRASH conference, Ms. Rand-Lewis emailed defense counsel and stated that she was too ill to attend the conference. The same day, defendants filed a notice of plaintiff's non-opposition to the motion for summary judgment.

On the morning of January 30, Ms. Rand-Lewis emailed defense counsel and said she would be moving ex parte to continue the hearing on the motion for summary judgment and extend the time for plaintiff to oppose the motion. Ms. Rand-Lewis stated, "The ex parte will be based on the fact that I have been ill and out of the office and thus unable to complete Plaintiff's Opposition to said motion." Later that day, Ms. Rand-Lewis emailed defendants' counsel again to say she would not be moving ex parte yet because she was waiting for a signed doctor's declaration to submit with the ex parte paperwork. On the evening of Sunday, February 2, Ms. Rand-Lewis emailed defense counsel again to say that the ex parte hearing would proceed on Tuesday, February 4, and that she could not do the ex parte Monday because there was a death in the family and "I have to attend to family matters on Monday."

On February 4, 2014—the day before the scheduled hearing on the motion for summary judgment—plaintiff's counsel filed the promised ex parte application to continue the hearing and extend the time to file an opposition, citing section 473, subdivision (b) (section 473(b)). In her declaration in support, Ms. Rand-Lewis said she became ill on January 2, and that her physician diagnosed her with migraines and placed her on bed rest until January 6; she included as an exhibit an email from a physician, dated January 2, stating the same. When she failed to improve, Ms. Rand-Lewis called her sister, Leslie B. Rand-Luby, M.D. Dr. Rand-Luby diagnosed Ms. Rand-Lewis with a severe viral infection. Ms. Rand-Lewis stated that on January 16, she was "ordered to complete bed rest for a minimum of ten days." A declaration from Dr. Rand-Luby states that she "evaluated" Ms. Rand-Lewis, determined that she "was likely suffering from a

severe viral infection," and "I advised my sister to remain off work and in bed." No dates are included in Dr. Rand-Luby's declaration. Ms. Rand-Lewis further stated in her declaration that she was "finally diagnosed with severe viral syndrome, most likely viral meningitis." As a result she was "severely ill and bed ridden for most of January, 2014" and unable to complete the opposition to defendants' motion. Ms. Rand-Lewis also said that although January 31 was her first day back at work, on February 2 she "learned that a family member had passed" and that the "unexpected family emergency [was] an additional basis for plaintiff's request to continue the hearing on defendants' motion for summary judgment."

Ms. Rand-Lewis did not appear at the ex parte hearing on February 4. Instead, appearing for plaintiff was Ms. Rand-Lewis's husband, Timothy Rand-Lewis, an attorney who previously had appeared in the case on behalf of plaintiff. He stated that while he was not employed by his wife, "we share space and I do work for her firm." The trial judge noted on the record that she had seen Ms. Rand-Lewis in the courthouse hallway on January 31; Ms. Rand-Lewis smiled and said hello, and did not appear to be ill.

The trial court was not pleased with Ms. Rand-Lewis's excuses for her tardiness, stating that the declaration "raises more questions than it answers." The court noted that the email purportedly from "urgent care" instructing Ms. Rand-Lewis to stay on bed rest was from a pediatrics department at UCLA and did not state any diagnosis. The declaration from Dr. Rand-Luby did not state what her specialty was, whether she evaluated Ms. Rand-Lewis in person or over the phone, or how she was able to diagnose a viral illness such as meningitis without any medical tests. Although Ms. Rand-Lewis said she was ordered to bed rest for ten days on January 16, she did not say which physician ordered the bed rest. She did not say who diagnosed her with viral meningitis or when that diagnosis occurred. As for the family emergency, the court noted that the declaration did not say whether the deceased relative was a parent or a distant, faraway cousin. Nor did it state whether Ms. Rand-Lewis needed to travel to a funeral or why the death otherwise required her absence from court.

The court also noted that while Ms. Rand-Lewis said that no other attorney in her office was capable of preparing the opposition to the motion for summary judgment while she was ill, she offered no explanation as to why no other attorney was able to seek a continuance. In the court's view, if Ms. Rand-Lewis was ill starting on January 2, she had ample time to find an attorney to file a request for an extension. In addition, Ms. Rand-Lewis could have appeared for the ex parte by CourtCall if she were unable to make it to the courthouse. The trial court also acknowledged the communications between Ms. Rand-Lewis and defense counsel through the month of January, and noted that most of them contained no mention of her illness. Although Ms. Rand-Lewis stated in her declaration that she had been ill since January 2, her January 13 email to defense counsel requested a continuance for the summary judgment hearing so she and her client would not have to incur the additional work and cost of opposing the motion for summary judgment before the CRASH conference—not because she was sick and unable to complete the opposition.

The trial court denied the request to continue the hearing. The court reasoned that while an attorney's illness is usually a sufficient reason for a continuance, Ms. Rand-Lewis's declaration lacked key information and was contradicted by other communications throughout the month of January. As a result, the court held that Ms. Rand-Lewis had not shown good cause for a continuance requested the day before the scheduled hearing.

D. *The hearing on defendants' motion for summary judgment*

At the summary judgment hearing the following day, the trial court read its tentative ruling into the record, stating that defendants met the requirement to shift the burden to plaintiff on each issue in the motion for summary judgment. She then allowed counsel to argue their positions. Plaintiff's counsel urged the court to deny the motion because the separate statement did not meet the procedural requirements set out in California Rules of Court, rule 3.1350 (rule 3.1350). Plaintiff also asserted that defendants did not provide an index for their evidence in support of the motion as required by court rules. In addition, plaintiff argued that the transcripts of plaintiff's

deposition submitted with the motion were not admissible because they were filed before the expiration of the 30-day window in which the deponent may make changes to the transcript as allowed by section 2025.520. Because the 30-day time limitation had not passed and plaintiff had not signed the deposition transcripts, plaintiff argued that the motion was not based on admissible evidence and should be denied.

The court overruled plaintiff's objections and granted the motion. The court entered judgment and awarded defendants costs as prevailing parties.

E. *The attorney fees award to defendants*

Following judgment, defendants moved for attorney fees in the amount of $292,567.50 under FEHA, Government Code section 12965, subdivision (b). Defendants argued that plaintiff's claims were meritless, because she voluntarily resigned from employment with El Pollo Loco as part of a negotiated settlement while represented by counsel, but later sued El Pollo Loco for wrongful termination, discrimination, harassment, and retaliation under FEHA. Defendants also argued that the fee amount was reasonable because plaintiff's own litigation tactics, such as forcing motions to compel discovery responses and requiring court orders for plaintiff to attend her own deposition, greatly increased the attorney fees in the case.

In her opposition[3] plaintiff argued that the lawsuit was not meritless because plaintiff's resignation was "forced" and she later attempted to rescind it. She also argued that because the complaint alleged only one FEHA cause of action, defendants were not entitled to attorney fees relating to litigation of the remaining nine causes of action. Plaintiff further argued that because plaintiff was unemployed and had a low, fixed income, she should not have to pay defendants' attorney fees.

[3] On May 21, 2014, plaintiff filed an ex parte motion to extend the time to file an opposition to the motion for attorney fees. As the motion for attorney fees was set for June 2, the opposition was due on May 19; thus at the time she sought an extension the opposition already was two days late. The ex parte apparently was granted; the motion hearing was moved to June 17.

The trial court found that plaintiff's lawsuit was meritless and partially granted the motion.[4] It found that plaintiff, while represented by counsel, negotiated a settlement with El Pollo Loco, agreeing to release all of her claims in exchange for $20,000. In addition, plaintiff testified that El Pollo Loco accommodated all of her requested accommodations and medical leaves, so there was no merit to her claims that she was discriminated against based on age or disability. The court also held that plaintiff's claims of discrimination and harassment under FEHA were factually and legally interrelated with her other causes of action, and therefore attorney fees were warranted. The court held, however, that defendants' request for $292,567.50 was excessive. The court noted that the settlement release was the primary basis for the motion for summary judgment, and as a result the issues that ultimately led to the resolution of the case were relatively simple. The court also said that plaintiff's financial condition was the most significant factor in its analysis. Although its tentative ruling was to award defendants $45,000 in attorney fees, the court in fact reduced the final attorney fee award to $15,000.

F. *The costs award to defendants*

Defendants also sought $22,409.30 in costs as the prevailing party under section 1033.5. Plaintiff filed a motion to tax costs, arguing that the amount associated with plaintiff's deposition was excessive because it included a recorded notice of plaintiff's non-appearance and nearly $10,000 for transcripts. Plaintiff also argued that certain travel costs for depositions were excessive, and that interpreter costs could not be awarded pursuant to section 1033.5.

Defendants opposed the motion, pointing out that the court reporter's record of plaintiff's non-appearance was warranted due to the fact that the trial court had ordered plaintiff to appear on that date and plaintiff was in violation of that order. Defendants also submitted backup documentation to support the cost charges, including invoices for expedited transcripts for the four days of plaintiff's deposition. Defendants adjusted

[4] After the court ruled on defendants' motion for summary judgment, the case was transferred to a different department; the costs and attorney fees issues were therefore decided by a second trial court judge.

some of the travel costs to which plaintiff objected, and argued that interpreter fees were required because plaintiff insisted on having an interpreter at the deposition, despite the fact that she primarily spoke English throughout her employment with El Pollo Loco.

Of the $22,409.30 in costs requested by defendants, the trial court taxed $6,337.23, awarding the remaining $16,072.07 to defendants. Plaintiff timely appealed the judgment and costs award, and separately appealed the ruling on attorney fees. We consolidated the appeals.

DISCUSSION

A. *The trial court did not abuse its discretion by denying plaintiff's ex parte request to extend time to oppose the motion for summary judgment*

1. *Plaintiff was not entitled to relief under Section 473(b)*

"It is well established that the trial court's ruling on a motion for relief under section 473 is reviewed for an abuse of discretion." (*Murray & Murray v. Raissi Real Estate Development, LLC* (2015) 233 Cal.App.4th 379, 384.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

Plaintiff argued in her ex parte application that the trial court was required to grant her request for an extension of time under the mandatory provision of section 473(b), or in the alternative, under the discretionary provision of the same statute. She repeats the same arguments on appeal. Both arguments are incorrect. Section 473(b) does not provide a basis upon which a court may grant an extension of time or a requested continuance of a motion for summary judgment.

The mandatory provision of section 473(b) states, "[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court

finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." Courts refer to this section as "mandatory" because it requires the court to vacate a default or default judgment when the party's counsel swears in an affidavit that the default or dismissal was caused by the attorney's mistake, inadvertence, surprise, or neglect. (*Las Vegas Land and Development Company, LLC v. Wilkie Way, LLC* (2013) 219 Cal.App.4th 1086, 1090 (*Las Vegas Land*).)

The mandatory provision of section 473(b) is remedial—it allows for relief from a "default entered by the clerk," a "default judgment," or a "dismissal." (§ 473(b).) It therefore anticipates that the court already has entered default, default judgment, or dismissal, from which the moving party needs relief. By its own terms, the mandatory provision of section 473(b) does not address summary judgments, which are not defaults, default judgments, or dismissals.

Plaintiff cites *Avila v. Chua* (1997) 57 Cal.App.4th 860, 868 (*Avila*) for the proposition that the mandatory provision of section 473(b) nonetheless requires a court to grant relief from entry of summary judgment because, according to that opinion, a summary judgment is similar to a "dismissal" in that the plaintiff "lost his day in court due solely to his lawyer's failure to timely act." Defendants point to *English v. IKON* (2001) 94 Cal.App.4th 130 (*English*), which rejects *Avila*'s reasoning and holds that because the plain language of the mandatory provision addresses only a "default entered by the clerk," a "default judgment," or "dismissal," it cannot be reasonably read to allow relief from summary judgment. (See *English*, at pp. 138-140, relying on *Ayala v. Southwest Leasing & Rental, Inc*. (1992) 7 Cal.App.4th 40.) The overwhelming weight of authority rejects the reasoning of *Avila* and follows the holding in *English*. (See, e.g., *Las Vegas Land, supra*, 219 Cal.App.4th 1086; *Henderson v. Pacific Gas and Elec. Co.* (2010) 187 Cal.App.4th 215, 228; *Hossain v. Hossain* (2007) 157 Cal.App.4th 454; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290.)

None of the cases is analogous to the situation here, where plaintiff's counsel failed to file a timely opposition and then invoked section 473(b) in an attempt to convince the court to allow plaintiff to file a late opposition and continue the hearing

date. By contrast, in each of the cases discussing the mandatory provision of section 473(b), the moving party was seeking relief from either an order granting a motion for summary judgment or the judgment itself. In *Avila*, the plaintiff filed an untimely opposition to the defendant's motion for summary judgment; the court struck the late opposition and granted the motion. Two days later the plaintiff moved for relief under section 473(b). (*Avila*, *supra*, 57 Cal.App.4th at pp. 865-866.) In *English*, the defendant moved for summary judgment. Rather than offering a substantive opposition, the plaintiff based her opposition entirely on section 437c, subdivision (h), a portion of the summary judgment statute allowing opposing parties to request an extension of time if additional discovery is needed to oppose a motion for summary judgment. (*English*, *supra*, 94 Cal.App.4th at pp. 133-134.) The trial court granted the defendant's motion, and the plaintiff later moved to vacate the summary judgment entered against her. (*Id.*, at p. 134.) In *Prieto*, the plaintiff never filed an opposition to the defendant's motion for summary judgment and judgment was entered; the plaintiff later moved to set aside the judgment under section 473(b). (*Prieto*, *supra*, 132 Cal.App.4th at p. 293.) In *Henderson*, the plaintiff failed to timely file an opposition or supporting documents to the defendant's motion for summary judgment and sought to continue the hearing; the trial court denied the request for a continuance, granted the motion, and later entered judgment. (*Henderson*, *supra*, 187 Cal.App.4th at p. 221.) The plaintiff then moved to vacate the judgment under section 473(b). (*Ibid*.) And in *Las Vegas Land*, the plaintiff did not file an opposition to the motion for summary judgment but its counsel appeared at the hearing; the court granted the motion and entered judgment. (*Las Vegas*, *supra*, 219 Cal.App.4th at p. 1089.) Six months later, the plaintiff moved to set aside the judgment under section 473(b). (*Ibid*.) With the exception of *Avila*, the court in each of these cases held that the mandatory provision of section 473(b) did not provide for relief from summary judgment.

Here, by sharp contrast, plaintiff did not invoke section 473(b)'s mandatory provision to set aside a summary judgment after judgment had been entered. Instead, she contended that she was entitled to mandatory relief *before* the motion for summary

judgment was heard. Whether *Avila* or the *English* line of cases is correct with respect to the effect of section 473(b) on summary judgments is of no import here; under no reasonable reading of the statute does section 473(b) require *prospective* mandatory forgiveness for a future late-filed opposition. The mandatory relief provision of section 473(b) contains no reference to untimely motions or oppositions that have yet to be filed, and it does not require a trial court to continue a hearing.

Plaintiff fares no better under the discretionary provision of section 473(b): "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." As with the mandatory provision, the discretionary provision only provides relief from a "judgment, dismissal, order, or other proceeding" already "taken against" the party. It says nothing of advance forgiveness for filing a late opposition to a motion or the continuance of hearing dates.

Even if the discretionary provision of section 473(b) were applicable here, plaintiff failed to comply with its requirements. The statute states, "Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted . . . ." Plaintiff did not file a proposed opposition to the motion for summary judgment with her ex parte application. A court's discretion under section 473(b) "'may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits.'" (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419, quoting *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) Here, because plaintiff did not seek relief in a procedurally proper manner under section 473(b), the court did not abuse its discretion by denying her request to continue the hearing.

2. *The trial court's denial of a last-minute request for a continuance was not an abuse of discretion*

When a party seeks to continue a motion for summary judgment on a basis that is *not* encompassed within section 437c, subdivision (h) (relating to the need for additional discovery to oppose a motion for summary judgment), "the court must determine whether the party requesting the continuance has nonetheless established good cause therefor. That determination is within the court's discretion." (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) The denial of a request to continue a motion for summary judgment hearing is therefore reviewed for abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

"A party cannot defeat summary judgment with late-filed papers unless the court permits the late papers in the interests of justice." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) "A trial court has broad discretion under rule 3.1300(d) of the Rules of Court to refuse to consider papers served and filed beyond the deadline without a prior court order finding good cause for late submission." (*Ibid*.)

Plaintiff argues that the trial court was "clearly prejudiced" against her and therefore "punished" counsel for attempting to provide a "thorough explanation for the need for a continuance." The trial court was well within its discretion to determine that counsel's explanations for failing to file an opposition and failing to seek a continuance until the day before the hearing failed to demonstrate good cause.

In *Lerma*, *supra*, 120 Cal.App.4th 709, the plaintiff's attorney was served with a motion for summary judgment on the day he was admitted to the hospital to have his cancerous bladder removed; he learned of the motion two business days before the opposition was due. The attorney nonetheless filed a perfunctory opposition, together with a request for a continuance. (*Id*., at p. 711.) The trial court denied the continuance and the Court of Appeal reversed, holding, "The fact that the incapacitated attorney filed anything at all was nothing short of heroic. The request he filed unquestionably showed good cause for a continuance and the court abused its discretion in denying the request." (*Id*., at p. 712.)

Such extreme circumstances were not present here. Plaintiff's counsel was not completely incapacitated. Documents and declarations show she was able to make calls and send emails throughout the month of January, yet she never requested an extension due to illness. Even if she were unable to communicate with the court herself, she never contacted another attorney (such as her husband, who had appeared as counsel multiple times in the case) to make such a request on her behalf. Moreover, she provided no explanation for why she failed to seek a continuance earlier in the month, rather than waiting until the day before the hearing on the motion for summary judgment. When counsel's explanation of illness does not support the inability to timely request a continuance, it is not an abuse of discretion to deny the continuance. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 172.)

The trial court was well within its discretion to refuse plaintiff's very late request for a continuance to file an opposition to defendants' motion for summary judgment.

B. *The motion for summary judgment was properly granted*

A motion for summary judgment is normally reviewed de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) The de novo standard of review, however, applies only when the appellant has challenged the substance of the trial court's ruling on the motion for summary judgment. Here, by contrast, plaintiff's arguments focus only on the procedural correctness of defendants' separate statement, the manner in which defendants' evidence was submitted with the motion, and the admissibility of plaintiff's deposition testimony submitted in support of the motion. "[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.) We therefore address only the issues plaintiff raises in her opening brief.

Section 437c, subdivision (b)(1) provides that "failure to comply with [the] requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." We therefore review the court's rulings with respect to the separate statement for abuse of discretion. A trial court's rulings on the admissibility of evidence in support of a summary judgment are also reviewed for abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Plaintiff argues that the motion for summary judgment was improperly granted for three reasons.[5] First, plaintiff argues defendants "were not entitled to summary judgment as their separate statement never provided a proper basis for same in violation of rule 3.1350. The Trial Court committed reversible error by allowing the motion to go forward when [defendants] clearly had not provided a competent statement of facts." She cites rule 3.1350(b), which applies solely to the formatting for a separate statement supporting a motion for summary *adjudication*, which is not at issue here. A separate statement for a motion for summary judgment, as distinguished from a motion for summary adjudication, need not comply with rule 3.1350(b). (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.)

Plaintiff also cites rule 3.1350(d), which states that a separate statement "must separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense." Plaintiff includes no citations to the record, and she does not include any explanation as to why she believes defendants' separate statement failed to meet the requirements of rule 3.1350(d).

An appellate brief must "support each point by argument and, if possible, by citation of authority" and it must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1).) "'Contentions supported neither by argument nor by

[5] Although she did not submit a written opposition to the motion, plaintiff nonetheless preserved certain objections orally at the hearing. (§ 437c, subd. (b)(5), (d); *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532.)

citation of authority are deemed to be without foundation and to have been abandoned.'" (*In re Phoenix H.* (2009) 47 Cal.4th 835, 845, quoting *Bradley v. Butchart* (1933) 217 Cal. 731, 747.) As plaintiff's brief includes no citations to the record and no explanation as to why defendants' separate statement fails to comply with rule 3.1350, this argument is forfeited. Moreover, defendants' separate statement complies with the formatting requirements set forth in rule 3.1350(d), and we see no error.

Second, plaintiff argues that defendants' motion was "procedurally defective" because the evidence submitted in support of the motion did not comply with rule 3.1350(g): "If evidence in support of or in opposition to a motion exceeds 25 pages, the evidence must be separately bound and must include a table of contents." Plaintiff criticizes defendants' separate statement for failing to meet this requirement, but she does not articulate any argument explaining how the trial court erred by refusing to deny the motion based on this requirement.

A court has discretion to deny a motion for summary judgment based on failure to comply with the separate statement requirements. (Code Civ. Proc., § 437c, subd. (b)(1).) Such a denial, however, is not required: "[T]he court's power to deny summary judgment on the basis of failure to comply with California Rules of Court, rule 3.1350 is discretionary, not mandatory." (*Truong v. Glasser*, *supra*, 181 Cal.App.4th at p. 118.) Plaintiff does not establish that the trial court abused its discretion by considering defendants' separate statement despite its alleged procedural irregularities, so her argument does not support reversal on this basis.

Third, plaintiff argues that the motion should have been denied because her deposition testimony, which defendants relied on as evidence to support their motion, was not admissible. Plaintiff's deposition was taken over several days in late August; the motion was filed September 9. Section 2025.520, subdivisions (a) and (b) provide a period of 30 days for a deponent to review the transcript and "change the form or the substance of the answer to a question, and [to] either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it." (§ 2025.520.) Because she had not yet reviewed and signed her deposition at the time the

motion for summary judgment was filed, plaintiff argues that her deposition testimony was not admissible.

In support of her argument, plaintiff cites *Bennett v. Superior Court in and for San Diego County* (1950) 99 Cal.App.2d 585, in which the trial court found an attorney in contempt because while questioning a witness in court, the attorney repeatedly referenced a partial transcript from the witness's deposition, which had not been completely transcribed, reviewed, or signed. The trial court warned counsel that the document, being partially completed and never reviewed, was not an appropriate basis for questioning; the attorney persisted in questioning the witness about it and the trial court eventually found the attorney in contempt. In reversing the contempt order, the Court of Appeal noted that while the incomplete, unsigned transcript might not itself be admissible, it could nevertheless serve as a proper basis for questioning the witness. (*Bennett*, at p. 593.) Plaintiff also cites, without discussion, *Thomas v. Black* (1890) 84 Cal. 221 and *People v. Hjelm* (1964) 224 Cal.App.2d 649.

Neither *Bennett* nor the other cases plaintiff cites support her argument that her deposition is inadmissible. In the decades since those cases were decided, the rules have changed. Before 1976, the Code of Civil Procedure required that depositions must be reviewed and signed; that requirement has since been repealed. (See *Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 120 ["before 1976 the review and signing (by the deponent or the reporter with appropriate explanation) of depositions was mandated by law. Since 1976, section 2019, subdivision (e) does not include a requirement the deposition be signed."].) Following changes to the Code of Civil Procedure, an unsigned deposition transcript is no longer inadmissible. (*Ibid*.; see also *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244, 1248.) No modern case law, statute, or rule holds that a certified deposition transcript is inadmissible until the witness signs it. Indeed, Code of Civil Procedure section 2025.520 anticipates that a deposition transcript may remain unsigned: "If the deponent fails or refuses to approve the transcript within the allotted period, the deposition shall be given the same effect as

though it had been approved, subject to any changes timely made by the deponent." (§ 2025.520, subd. (f).)

Additionally, although the deposition transcripts were filed with the motion on September 9, 2013, the motion was not heard until February 5, 2014. Plaintiff did not demonstrate that she sought to make any changes to her deposition transcript in the nearly five-month period between the time the motion was filed and the hearing. She offered the trial court no information that would undermine the deposition testimony presented, other than citations to outdated and irrelevant procedural rules.

In sum, plaintiff has failed to establish that the trial court abused its discretion by considering defendants' separate statement and by overruling plaintiff's objection to the admissibility of her deposition testimony. Summary judgment is therefore affirmed.

C. *The trial court did not abuse its discretion by ordering a modest attorney fee award*

Plaintiff argues the trial court erred in awarding attorney fees to defendants because plaintiff is unemployed and on a fixed income. Government Code section 12965, subdivision (b) provides, "In civil actions brought under [FEHA], the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees." Discretion to award fees, however, is limited; attorney fees may be awarded to a defendant only if the trial court determines that the plaintiff's lawsuit is unreasonable, frivolous, meritless, or vexatious. (*Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948-949.) "'[M]eritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." (*Ibid*., citing *Christiansburg, Garment Co. v. EEOC* (1978) 434 U.S. 412, 421 (*Christiansburg*).) In addition, "a trial court has an obligation to consider a losing party's financial status before assessing attorney fees under the FEHA." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1204.) We review the trial court's award for abuse of discretion. (Govt. Code, § 12965, subd. (b); *Baker v. Mulholland Sec. and Patrol, Inc.* (2012) 204 Cal.App.4th 776, 782.)

Defendants requested $292,567.50 in attorney fees. In its tentative ruling, the trial court suggested awarding $45,000 in fees to defendants; following the hearing, the court awarded only $15,000 in fees. It is clear that the trial court considered plaintiff's financial status. In its written ruling the court discussed plaintiff's income, her living situation, her ability to work, and her age. Plaintiff argues that even $15,000 was too much for her to pay, but she has not demonstrated that the trial court erred in reaching its decision. We do not find that the very modest $15,000 fee award, about five percent of what defendants requested, exceeds the bounds of reason under the circumstances.

Plaintiff also argues that the trial court was incorrect in finding that her claims were meritless. We see no abuse of discretion. Noting that the *Christiansburg* standard requires a finding that the plaintiff's claims were "unreasonable, frivolous, or vexatious," the trial court held that plaintiff's "prosecution of this matter was at best unreasonable." The trial court acknowledged that plaintiff received $20,000 in exchange for her voluntary resignation from El Pollo Loco. The court also noted that plaintiff knew she was an at-will employee without a contract, she admitted that El Pollo Loco readily approved all of her medical accommodations and leaves of absence, and there was no evidence of any inappropriate conduct with respect to plaintiff's age or disability.

Plaintiff also argues, without citing to the record, that she rescinded her resignation and therefore El Pollo Loco "was required to return [plaintiff] to work." The trial court, on the other hand, noted in its ruling that the WCAB determined that plaintiff's resignation was binding and did not set it aside when plaintiff sought to do so. Plaintiff admitted that she received $20,000 from El Pollo Loco in exchange for the resignation, so it is unclear how the agreement was "rescinded." Even so, plaintiff's argument is incorrect; FEHA does not require an employer to continue employing a person who cannot perform her essential job duties without endangering her health or safety, or to transform a temporary accommodation into a permanent job assignment to accommodate a disabled employee. (Govt. Code, § 12940, subd. (a)(1); *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223-1224.)

Given El Pollo Loco's willing agreement to all of plaintiff's requests for medical leaves of absence and temporary accommodations, the lack of any evidence of age-related discrimination, and plaintiff's negotiated settlement while represented by counsel, the trial court was well within its discretion to find that plaintiff's claims lacked merit.

Plaintiff also argues that some portion of the attorney fees defendants sought was attributable to her non-FEHA causes of action. "When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees." (*Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1133.) "When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required." (*Ibid*.)

The trial court held that plaintiff's non-FEHA causes of action "were factually and legally interrelated with plaintiff's FEHA-based claims for disability discrimination and harassment." Other than stating that the complaint contains nine non-FEHA causes of action, plaintiff makes no attempt to show that the non-FEHA causes of action are not interrelated with the FEHA cause of action. Indeed, all of plaintiff's claims rested on the same facts, as stated in her complaint: "Plaintiff is seeking damages for discrimination based primarily upon age, physical disability from work-related injuries, perceived disability, and retaliation for filing for Workers' Compensation benefits, as well as refusal to evaluate and accommodate Plaintiff's disability." "Where fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion." (*Thompson Pacific Construction Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555.)

Plaintiff has not shown that the trial court abused its discretion by awarding $15,000 in attorney fees under FEHA.

D. *The amount of costs awarded must be reconsidered in light of new authority from the California Supreme Court*

1. *A recent ruling from the California Supreme Court mandates that the trial court exercise its discretion in awarding costs in a FEHA action*

Defendants requested $22,409.30 in costs, and after taxing some of the costs, the trial court awarded defendants $16,072.07. Plaintiff argues in her opening brief that several aspects of defendants' claimed costs were inappropriate. She argues for the first time in her reply brief that defendants are not entitled to costs as a matter of right as the prevailing party pursuant to section 1032, subdivision (b), because in FEHA cases, the award of such costs is discretionary rather than a matter of right.

Plaintiff bases her argument on the recent Supreme Court case *Williams v. Chino Valley Independent Fire Dist., supra*, 61 Cal.4th 97, which was issued shortly before the reply brief was filed. In that case, the Supreme Court noted that section 1032, subdivision (b) provides that costs should be awarded to a prevailing party as a matter of right "[e]xcept as otherwise expressly provided by statute." (*Id*. at pp. 100, 105.) Government Code section 12965, subdivision (b), on the other hand, provides that in FEHA cases, costs and fees should only be awarded in the trial court's discretion. Government Code section 12965, subdivision (b), therefore, is a statutory exception to section 1032, subdivision (b).

Williams held that pursuant to the United States Supreme Court's limitations in *Christiansburg, supra*, 434 U.S. 412, attorney fees and costs may be awarded to a prevailing defendant in a FEHA case in the court's discretion only if the court finds the plaintiff's claim "'was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" (*Williams, supra*, 61 Cal.4th at p. 101, quoting *Christiansburg* at p. 422.) The Court concluded, "A prevailing *defendant* . . . should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Williams* at p. 115.) Although this has long been the standard in

determining whether to award attorney fees to a prevailing defendant in a FEHA case (see, e.g., *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387), the same standard was not generally applied with respect to costs before *Williams*. *Williams* therefore established a new standard with respect to the discretionary award of costs in FEHA cases, rejecting contrary Court of Appeal cases.

Absent compelling and unusual circumstances, judicial decisions in tort cases are given full retroactive effect in all pending cases, including cases pending on appeal. (*Newman v. Emerson Radio Corp*. (1989) 48 Cal.3d 973, 983; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1334.) The standard articulated in *Williams* should therefore be applied in this case. Because plaintiff addressed *Williams* in her reply brief, we requested additional briefing from defendants about the application of *Williams* to this case.

As we held above, the trial court properly exercised its discretion in ruling that plaintiff's claims were meritless under the *Christiansburg* standard. There is no need to revisit that ruling with respect to costs. Defendants argue that this ends the inquiry, because remand would be necessary only if the court had *not* made such a finding. But finding that an action meets the *Christiansburg* standard does not entitle the prevailing party to costs. Rather, such a finding permits the court to exercise its discretion in determining whether to award costs. (*Williams*, *supra*, 61 Cal.4th at p. 99 ["in awarding attorney fees and costs, the trial court's discretion is bounded by the rule of *Christiansburg*"]; Gov. Code, § 12965, subd. (b) ["In civil actions brought under this section, the court, *in its discretion*, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees."] [emphasis added].)

In exercising its discretion with respect to FEHA awards under Government Code section 12965, subdivision (b), a trial court must consider a plaintiff's ability to pay. (*Villanueva, supra*, 160 Cal.App.4th at p.1203.) The trial court considered plaintiff's ability to pay in determining whether to award attorney fees to defendants, reducing the fee award to just $15,000 "due to Plaintiff's poor financial condition." The trial court, however, did not have the benefit of *Williams* at the time it awarded costs, so it did not

take plaintiff's ability to pay or other potentially relevant factors into consideration. The trial court therefore did not employ its discretion in determining whether to award costs to defendants under Government Code section 12965, subdivision (b), and if so, how much of defendants' requested costs it would include in the award. We therefore remand so the trial court can consider its cost award in light of *Williams* and the standards of Government Code section 12965, subdivision (b).

Defendants also argue that notwithstanding *Williams*, they are entitled to costs as prevailing parties under section 1032, subdivision (b) for plaintiff's non-FEHA causes of action. Because nine of plaintiff's ten causes of action were non-FEHA claims, defendants argue, they are entitled to costs on those causes of action as a matter of right. They ask us to distinguish *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1058-1062 (*Roman*), a post-*Williams* case that included both FEHA and non-FEHA causes of action. In *Roman*, Division Seven of this district held that the defendants would only be entitled to costs as a matter of right under section 1032, subdivision (b) without satisfying the *Christiansburg* standard if the plaintiff's "pleading of non-FEHA causes of action had led [the defendant] to incur additional allowable costs." (*Roman*, at p. 1059.) Thus, whether defendants were entitled to costs as a matter of right under section 1032 or the court had discretion to award under *Williams* depended on to what extent the FEHA and non-FEHA claims overlapped.

This case is indeed distinguishable from *Roman*, but not for the reasons defendants assert. First, as noted above, the trial court has already found that plaintiff's claims were meritless under the *Christiansburg* standard. There is no need to revisit that ruling with respect to defendants' costs, and therefore defendants' argument that they should be entitled to costs as a matter of right without addressing the *Christiansburg* standard is moot. Second, we reject defendants' argument that "in stark contrast to *Roman*," because plaintiff asserted a variety of non-FEHA claims, "it cannot be said that Plaintiff's one FEHA claim was the 'primary' claim at issue in the instant litigation." Defendants made the opposite argument in seeking attorneys' fees in the trial court below, arguing that "defendants are entitled to fees under the FEHA because all of plaintiff's ten causes of

action were inextricably premised on her FEHA claims." The trial court agreed with defendants' position and awarded defendants attorney fees after finding that plaintiff's non-FEHA causes of action "were factually and legally interrelated with Plaintiff's FEHA-based claims for disability discrimination and harassment." Defendants may not bolster their cost award argument by taking the opposite position now, and there is no need for the trial court to revisit its finding that the FEHA and non-FEHA claims were closely interrelated.

The trial court may therefore exercise its discretion to award defendants all of their claimed costs again, or it may limit those costs pursuant to *Williams* and relevant considerations relating to FEHA awards. We leave those decisions to the trial court's discretion on remand. Because plaintiff has challenged the propriety of some of the costs claimed by defendants, however, we address the merits of those arguments to avoid relitigation of those issues below. We find that the trial court did not err in finding the requested costs reasonable.

2. *Errors in the amounts listed in the memorandum of costs*

Plaintiff argues that defendants filed a "false memorandum of costs [that] claimed numerous costs that were neither incurred nor paid." Although there is no explanation in plaintiff's opening brief about which costs are allegedly false or inflated, in her reply brief she points to travel expenses in defendants' memorandum of costs relating to four witnesses' depositions, and slightly lower amounts for those same travel costs in the exhibits defendants submitted with their opposition to plaintiff's motion to tax. For three of these four witnesses, the trial court taxed the costs to match the lower amount.

Plaintiff argues that because the amounts listed in the memorandum of costs were "false," the entire memorandum should have been stricken pursuant to California Rules of Court, rule 3.1700(a), which states in part, "The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case." Plaintiff provides no legal authority for her proposition that a slightly mistaken amount warrants striking a memorandum of costs. Indeed, the procedure under California Rules

of Court, rule 3.1700(b) allowing a party to move to tax certain costs and providing the authority for the court to do so indicates that a trial court may eliminate unrecoverable costs without striking the entire cost memorandum. That is exactly what occurred here. Plaintiff has not demonstrated that the trial court abused its discretion by not striking the cost memorandum in its entirety based on slightly erroneous dollar amounts.

3. *Costs for plaintiff's deposition*

Plaintiff's argument relating to the reasonableness of the costs for plaintiff's deposition is two-fold. First, she argues that the costs defendants claimed for plaintiff's deposition when plaintiff failed to appear were not recoverable. Second, she argues that the amount charged for deposition transcripts was unreasonable.

Regarding the deposition costs for the day plaintiff failed to appear for her scheduled deposition, plaintiff has not shown that the court abused its discretion by declining to tax those costs. Defendants first noticed plaintiff's deposition in December 2012, but plaintiff refused to appear. In April 2013, the court ordered plaintiff to appear for her deposition in May; she did not appear on the date ordered, and defendants had the court reporter officially note the non-appearance. The court later noted that plaintiff violated a court order for failing to appear, and warned that any further delays would result in sanctions. Plaintiff argues the trial court should have taxed the cost for this transcript, because it was not reasonable for defendants to create a transcript to reflect her non-appearance. She made the same argument below, and the trial court held that the costs were reasonable and necessary because plaintiff had been ordered to appear and violated a court order by failing to do so.

Allowable costs include "[t]aking, video recording, and transcribing necessary depositions." (§ 1033.5, subd. (a)(3).) Plaintiff cites no authority, and we are aware of none, holding that costs for a non-appearance at a deposition are not recoverable. We note as well that the expense was incurred because of plaintiff's own conduct in failing repeatedly to appear for her deposition. Plaintiff has not demonstrated that the trial court's decision to allow defendants to recover this cost was beyond the bounds of reason.

Plaintiff also argues that defendants' claimed cost of expediting the transcript was an unrecoverable "convenience" for counsel. (§ 1033.5, subd. (c)(2) ["Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation."].) Defendants' need for the expedited transcript was not a convenience—it was a necessity caused by plaintiff herself, who refused to appear for her deposition until shortly before the deadline for filing the motion for summary judgment. As the trial court noted, had plaintiff appeared for her deposition as she was ordered to do in May, there would have been no need for the expedited transcripts. The trial court did not abuse its discretion by holding that the costs for expedited transcripts were recoverable.

In addition, plaintiff argues that the costs defendants claimed for the deposition transcripts were too high. Plaintiff divided the deposition charges by the pages of the transcript to arrive at a per-page amount, and argues that defendants' per-page amount is unreasonable, especially compared to the lower per-page amount plaintiff paid for other deposition transcripts in the case. Defendants provided the trial court with the invoices from the court reporting service for the expedited transcripts for each session of plaintiff's four-day deposition. It is clear, therefore, that the charges were in fact incurred and paid by defendants, and as noted, plaintiff herself was responsible for the necessity to expedite the transcripts—a service for which court reporting services generally charge a premium.

With respect to costs, "[t]he determination of reasonableness is peculiarly within the trial court's discretion." (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 77.) The evidence presented to the trial court supported the court's determination the transcript costs were reasonable, and it will not be disturbed on appeal. (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 55; *Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1396.)

4. *Service of process*

Plaintiff also argues in a short paragraph with no citations to the record that costs relating to service of process on plaintiff's workers' compensation attorney should not be

allowed because service was not actually effected. Defendants included costs for three service attempts on the attorney in their memorandum of costs. Plaintiff cites part of section 1033.5, subdivision (a)(4)(B), which allows for service by a registered process server so long as the "cost is the amount actually incurred in effecting service . . . ." She argues that because service on the attorney was never completed, the costs for attempted service are not recoverable.

While section 1033.5 allows for service costs as a matter of right, it does not bar the award of costs for attempts to effect service. To the contrary, it explicitly allows for costs relating to "a stakeout or other means employed in locating the person to be served" (§ 1033.5, subd. (a)(4)(B)), therefore anticipating that attempted service will not always be successful. Furthermore, even if the costs associated with attempted but not effected service may not be awarded as a matter of right under subdivision (a)(4)(B), subdivision (c)(4) gives the trial court discretion to award additional costs. (§1033.5, subd. (c)(4) ["Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."].) Here, the trial court rejected the same argument below and held that defendants' attempts to serve plaintiff's workers' compensation attorney were reasonable because he was a witness with possible relevant information about the case. We see no abuse of discretion in the court's reasoning or ruling.

The costs plaintiff challenges on appeal, therefore, are not unreasonable. However, given the newly articulated standards in *Williams* providing that the trial court must exercise its discretion in awarding costs in a FEHA case, the cost award is reversed and remanded to allow the trial court to exercise its discretion in determining the appropriate amount of costs to award to defendants.

DISPOSITION

Summary judgment in favor of defendants and the award of attorney fees to defendants is affirmed. The case is remanded for consideration of the costs award in light of the standards articulated in *Williams, supra,* 61 Cal.4th 97. Respondent is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.